ORIGINAL

No. 87-6431

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WAYNE T. SCHMUCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

Petitioner was charged under 18 U.S.C. 1341 with committing mail fraud by devising a scheme to sell automobiles after he had reduced the mileage readings on their odometers and causing mailings in furtherance of that scheme. The district court refused to instruct the jury that it could convict petitioner of odometer tampering, a misdemeanor under 15 U.S.C. 1990c. The questions presented are:

1. Whether petitioner was entitled to a jury instruction on odometer tampering because the proof at trial showed that he committed that crime and because that crime is inherently related to the crime with which he was charged, even though not all the elements of odometer tampering are elements of mail fraud.

2. Whether the mailings caused by petitioner's scheme to defraud were sufficiently connected to and in furtherance of that scheme to support petitioner's conviction of mail fraud.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. iii-xxiv) is reported at 840 F.2d 384. The original panel opinion (Pet. App. xxvii-xli) is reported at 776 F.2d 1368.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 21, 1988. The petition for a writ of certiorari was filed on February 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on 12 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 90 days' imprisonment on Count 1 and he was placed on four years' probation on each of Counts 2 through 12. A panel of the court of appeals reversed petitioner's conviction (Pet. App. xxviii-xli). The panel decision was subsequently vacated

(id. at xxv), and on rehearing en banc petitioner's conviction was affirmed (id. at iii-xxiv).

1. The evidence at trial, the substance of which is not in dispute, showed that petitioner engaged in a scheme to defraud purchasers of used automobiles by substantially reducing the mileage readings on the automobiles' odometers. Petitioner "would purchase automobiles, cause their odometer readings to be altered, offer them to dealers, and provide purchasing dealers with an odometer statement reflecting the false mileage." Pet. App. iv. The dealers in turn would sell the automobiles to retail customers; both the dealers and their customers relied on the false odometer readings and paid more for the automobiles than they would have paid had they been aware of the true mileage. To obtain titles in the names of the purchasers, a necessary prerequisite to the marketability of the cars, the dealers mailed Wisconsin title applications to the Wisconsin Department of Transportation. Ibid. The government maintained that petitioner caused the mailings for the purpose of executing the scheme (id. at xliv (indictment)).

2. Petitioner was charged under 18 U.S.C. 1341, which prohibits the use of the mails for the purpose of executing a scheme to defraud or in order to obtain money or property by false and fraudulent pretenses. Violations of Section 1341 are punishable by up to five years' imprisonment and a fine of up to $1,000. Prior to trial, petitioner requested a lesser included offense instruction under Fed. R. Crim. P. 31(c), which provides that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged." Petitioner asked the district court to instruct the jury that it could convict him under 15 U.S.C. 1990c. Under Section 1990c, it is a misdemeanor to violate 15 U.S.C. 1984, which forbids anyone to "disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the

number of miles indicated thereon." The court declined to give the requested instruction.

Prior to trial, petitioner also asked the district court to dismiss the indictment, arguing that it failed properly to allege that the mailings of title applications by the dealers furthered the fraudulent scheme (see Pet. App. xlvi). The district court denied the motion, holding that it was enough for the indictment to allege that the mailings were caused by petitioner for the purpose of executing the scheme and that the question whether the mailings actually furthered the scheme was one for the jury (ibid.). At trial, petitioner did not dispute the evidence that he tampered with the odometers. His defense rested largely on the claim that the mailings were not in furtherance of his fraudulent scheme because they were not necessary to the scheme's success and in fact created a danger that he would be apprehended. See Tr. 12, 16-18.

3. a. On appeal, petitioner maintained that on the facts developed at trial no rational jury could have concluded that the mailings were in furtherance of his scheme. On that point, the panel that initially heard petitioner's appeal unanimously agreed that the facts supported a conclusion that the mailings furthered petitioner's scheme. See Pet. App. xxix (citing United States v. Galloway, 664 F.2d 161 (7th Cir. 1981), cert. denied, 456 U.S. 1006 (1982)), xl-xli (Fairchild, J., concurring on this point)).

Petitioner also contended that he was entitled to a lesser-included-offense instruction on the misdemeanor offense of odometer tampering. He argued that he was entitled to such a charge under Seventh Circuit precedent, which at that time applied the "inherent relationship" test to determine whether a lesser included offense instruction should be given (see Pet. App. xxxii). 1/ Under the inherent relationship test, a lesser

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1/ As this Court has explained, a federal defendant "is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." Keeble v. United States. (Continued)

offense is deemed to be included within a greater when (1) the facts as alleged in the indictment and as proved at trial support the inference that the defendant committed the lesser offense, and (2) there is an inherent relationship between the two crimes (id. at xxxi-xxxii). Offenses have an inherent relationship where they "relate to the protection of the same interests and where proof of the greater offense can generally be expected to require proof of the lesser offense" (id. at xxxii (citation omitted)). Under the inherent relationship test, a lesser offense can be included within a greater even though its statutory definition contains an element not contained in the definition of the greater offense, as long as the proof at trial shows that the lesser offense was committed. 2/

The traditional "elements" test, by contrast, "requires identity of the elements of the two offenses, such that some of the elements of the crime charged themselves comprise a separate, lesser offense; to be necessarily included, the elements of the lesser offense must be a subset of the elements of the charged offense." Pet. App. v (citations omitted). Accordingly, under the elements test a lesser included offense instruction will be refused "where the lesser offense requires an element not

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412 U.S. 205, 208 (1973); see Mathews v. United States, No. 86-6109 (Feb. 24, 1988), slip op. 5. This case involves the test that should be used to determine whether a lesser offense is included within a greater.

2/ The inherent relationship test permits an instruction on an offense not listed in the indictment, the proof of which depends on facts that were developed at trial but were not alleged in the indictment. Constitutional requirements of fair notice, however, have been held to preclude the prosecution from requesting such an instruction (see Pet. App. xiii; Stirone v. United States, 361 U.S. 212 (1960) (defendant may not be convicted of crime not charged in the indictment)). Those requirements do not apply to the defendant. Under the inherent relationship test, therefore, the defendant will sometimes be entitled to an instruction that the government could not seek. The inherent relationship tests thus dispenses with the usual principle of "mutuality," under which an instruction is available to one party only if it is also available to the other. See id. at v n.1; see also Keeble v. United States, 412 U.S. 205, 214 n.14 (1973) (noting that the mutuality requirement was abandoned by first case to adopt inherent relationship test, United States v. Whitaker, 447 F.2d 314, 321 (D.C. Cir. 1971)).

required for the greater offense" (ibid.), even if that element is proved at trial.

The panel majority agreed with petitioner that under the inherent relationship test odometer tampering was a lesser offense included within mail fraud and that petitioner was entitled to an instruction on odometer tampering. The panel therefore reversed petitioner's conviction. The majority explained that, although there are any number of mail fraud schemes that have nothing to do with odometer tampering, the scheme that the prosecution proved at trial involved tampering with odometers. Pet. App. xxx-xxxi. In addition, the majority held that there is an inherent relationship between the two offenses because "[b]oth offenses protect against the same societal wrong: fraud. And it can generally be expected that proof of mail fraud will entail proof of a completed underlying 'fraud,' although this is certainly not always true." Id. at xxxii (citations omitted). Judge Fairchild dissented, arguing that mail fraud and odometer tampering are not so closely connected as to have an inherent relationship (id. at xxxix-xl).

b. On rehearing, the en banc court abandoned the inherent relationship standard and embraced the elements test. The en banc court also agreed with the panel that there was sufficient evidence to support the conclusion that the mailings were in furtherance of the scheme. Pet. App. iv.

The en banc court held that one offense is necessarily included within another for the purpose of Rule 31(c) of the Federal Rules of Criminal Procedure "only when the elements of the lesser offense form a subset of the elements of the charged offense" (Pet. App. ix-x (footnote omitted)). The elements approach, the court found, "is grounded in the terms and history of Rule 31(c), comports with the constitutional requirement of notice to defendants of the potential for conviction of an offense not separately charged, permits a greater degree of certainty in the application of Rule 31(c), and harmonizes the

concept of 'necessarily included' under Rule 31(c) with that of a lesser included offense where the issue is double jeopardy." Id. at x-xi.

Mail fraud, the en banc court found (Pet. App. vi), requires that the defendant devise a scheme to defraud and that the mails be used in furtherance of that scheme, but it does not require proof that the scheme was successfully carried out. Moreover, the court of appeals observed (id. at vii) that the indictment in this case alleged that petitioner devised a scheme that involved the alteration of odometers, but not that he actually altered the odometers (see id. at xlii-xliv (indictment)). Odometer tampering under 15 U.S.C. 1984 and 1990c requires that the defendant knowingly and willfully alter or cause the alteration of an odometer with intent to change the number of miles indicated (ibid.). Accordingly, the court of appeals concluded that petitioner could have been convicted of mail fraud as it is defined in the statute and as it was described in the indictment, without any proof that he tampered with an odometer. For that reason, the court affirmed the district court's refusal to give an instruction on odometer tampering. 3/

Two judges dissented from the en banc opinion (Pet. App. xv-xxiv). 4/ They maintained that it is "inherently contradictory to discuss the appropriateness of giving any jury instruction without reference to the evidence adduced at trial" (id. at

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3/ By reading the indictment as not alleging that petitioner actually tampered with odometers, the court of appeals was able to avoid deciding whether the greater and lesser offenses must be compared solely on the basis of their statutory elements, or whether a lesser offense is included within a greater when the allegations of the indictment state all the elements of the lesser offense, even though the statutory definition of the greater offense does not include all of those elements. See id. at vii, xv. Thus, in this case the court of appeals decided only that the defendant is not entitled to an instruction on an offense that is not included in either (1) the statutory definition of the offense charged or (2) the allegations in the indictment.

4/ The dissenting judges agreed that the district court properly permitted the jury to decide whether the mailings actually furthered petitioner's scheme. See Pet. App. xxiii.

xvi). According to the dissenters, it is unreasonable to define an offense solely in terms of its statutory elements: "[p]ermitting consideration of the indictment and succeeding evidence, in addition to the elements set forth in the relevant statutes, can only lead to a more complete and accurate determination of the character of the 'offense charged' in a given case, and of the lesser offenses necessarily subsumed therein." Id. at xvii.

ARGUMENT

We agree with petitioner that the definition of a lesser included offense under Fed. R. Crim. P. 31(c) presents a significant and recurring question on which the courts of appeals disagree. Accordingly, we do not oppose the grant of a writ of certiorari with respect to that issue. Petitioner's other contentions, however, are without merit and the issues they present do not warrant review by this Court.

1. a. As petitioner notes (see Pet. 13-14), the courts of appeals have taken inconsistent positions on the standard that should be used to determine whether a lesser offense is included within a greater (see Pet. App. x n.5). In this case the Seventh Circuit has explicitly rejected the "inherent relationship" test and has endorsed the "elements" test. The Third Circuit employs the elements test, see, e.g., Government of the Virgin Islands v. Bedford, 671 F.2d 758, 765 (1982) (offenses to be analyzed in the abstract in determining what is included), and has specifically declined to adopt the inherent relationship standard, Government of the Virgin Islands v. Joseph, 765 F.2d 394, 397 n.4 (1985). The Eighth Circuit has also refused to require a lesser included offense instruction where the lesser offense has elements not shared by the greater, even though the lesser offense has been proved at trial. United States v. Campbell, 652 F.2d 760, 762-763 (1981) (reserving position on mutuality requirement). 5/

5/ The Second Circuit states the test in terms of the elements of the offense, see, e.g., United States v. LoRusso, 695 F.2d 45, (Continued)

Three courts of appeals employ the inherent relationship standard. The test originated with the District of Columbia Circuit in United States v. Whitaker, 447 F.2d 314 (1971). The standard has subsequently been adopted by the Ninth Circuit in United States v. Stolarz, 550 F.2d 488, 491-493, cert. denied, 434 U.S. 851 (1977) (see also United States v. Johnson, 637 F.2d 1224, 1233-1241 (9th Cir. 1980); United States v. Martin, 783 F.2d 1449, 1451-1453 (9th Cir. 1986)), and by the Tenth Circuit, in United States v. Pino, 606 F.2d 908, 914-917 (10th Cir. 1979) (see also United States v. Zang, 703 F.2d 1186, 1196 (10th Cir.), cert. denied, 464 U.S. 828 (1983)). 6/

b. On the merits, we believe that in order for a lesser included offense instruction to be given, all the statutory elements of the lesser offense must be elements of the greater offense as well. That is, an offense cannot be regarded as a lesser included offense unless it is impossible to commit the greater offense without also committing the lesser. 7/ This approach represents the proper reading of Rule 31(c), it comports with this Court's cases on lesser included offense instructions,

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52 n.3 (1982), cert. denied, 460 U.S. 1070 (1983), but it has not specifically addressed the inherent relationship standard. The Fourth and Fifth Circuits have framed the standard in a manner consistent with the elements test but do not appear to have confronted the specific question raised here and have not commented on the inherent relationship test. See United States v. Carter, 540 F.2d 753, 754 (4th Cir. 1976); United States v. Williams, 775 F.2d 1295, 1302 (5th Cir. 1985), cert. denied, 474 U.S. 1089 (1986).

6/ Although the Tenth Circuit embraced the inherent relationship test in Pino, it has since also employed the elements test. See, e.g., United States v. Chapman, 615 F.2d 1294, 1298-1299, cert. denied, 446 U.S. 967 (1980). The definition of a lesser included offense was not a contested issue in Chapman, which turned on the compatibility of the lesser offense charge with the evidence. Recently, one member of that court has suggested that both tests should be applied: the elements test should apply to requests by the prosecution, while the inherent relationship standard should apply to requests by the defendant. United States v. Cooper, 812 F.2d 1283, 1289-1290 (1987) (McKay, J., concurring and dissenting).

7/ Thus, we believe that the question the court of appeals declined to reach -- whether the indictment can serve to characterize the greater offense in a way that includes within it all the elements of the lesser offense -- should be answered in the negative. The elements of an offense are those set forth in the relevant statute.

and it is consistent with the parallel analysis of lesser included offenses in the double jeopardy context. In addition, it promotes certainty and preserves the grand jury's authority to determine the statute under which the defendant is to be tried.

First, Rule 31(c) by its terms permits conviction of a lesser offense that is "necessarily included in the offense charged." Although that language does not conclude the inquiry, its reference to necessary inclusion does accord with a comparison of offenses in the abstract, not on the basis of the facts at trial. In addition, the elements test is recognized as the traditional approach to defining a lesser included offense (see Whitaker, 447 F.2d 318 n.11), and Rule 31(c) was designed to codify pre-existing law (Fed. R. Crim. P. 31(c) advisory committee note; see Keeble v. United States, 412 U.S. 205, 208 n.6 (1973)).

Second, although this Court has not addressed the specific question raised here, 8/ the Court's cases discuss the concept of a lesser included offense in terms of the elements of the crime. As the Court has explained, "'[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense.'" Sansone v. United States, 380 U.S. 343, 349 (1965) (quoting Berra v. United States, 351 U.S. 131, 134 (1956)). See also Beck v. Alabama, 447 U.S. 625, 627-628 (1980) (felony murder a lesser offense included within intentional murder in the course of a robbery).

Third, under the Double Jeopardy Clause, the Court has held that a lesser included offense is the same offense as the greater crime only if it is "invariably true [that] the lesser offense

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8/ In Keeble, 412 U.S. at 214 n.14, the Court noted that Whitaker had abandoned the traditional rule of "mutuality," but the Court did not address the question of the proper test to be used in determining whether a lesser included offense instruction should be given.

* * * requires no proof beyond that which is required for conviction of the greater" (Brown v. Ohio, 432 U.S. 161, 169 (1977)). In Brown (see 432 U.S. at 166), the Court drew on its holding in Blockburger v. United States, 284 U.S. 299, 304 (1932) (citation omitted), that two offenses are the same when they have the same statutory elements: "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." The Blockburger test, however, would not be satisfied by the inherent relationship standard, which permits an offense to be included within another even though each requires proof of a fact that the other does not. The Court's double jeopardy jurisprudence thus confirms that the statutory elements standard embodies the natural understanding of what constitutes a lesser included offense. 9/

Fourth, the statutory elements test has the advantages of simplicity and certainty. Because it requires that statutes be compared in the abstract and does not involve the inferences that might reasonably be drawn from the evidence at trial, the test makes it possible to predict before trial the offenses on which the jury will be instructed, enabling both sides to plan their strategies acccordingly. And because it does not turn on easily contestable factors such as what the evidence at trial showed and whether two offenses are "inherently related" in light of the proof at trial, the elements test should also minimize litigation over whether a lesser included offense instruction should have been given in a particular case.

Finally, because it permits the jury to consider only the crime listed in the indictment (or one established by statute as

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9/ As in the double jeopardy context, we submit that satisfying the elements test is a necessary, but not sufficient condition for the creation of a lesser included offense. See Garrett v. United States, 471 U.S. 773 (1985). If Congress intends to create entirely separate offenses, a lesser included offense instruction is not appropriate even if the elements of the lesser offense are all included within the greater.

a lesser included offense), the statutory elements test accords with this Court's recognition that the responsibility for selecting the statute under which the accused will be prosecuted falls to the grand jury. See United States v. Batchelder, 442 U.S. 114 (1979); Garrett v. United States, 471 U.S. 773, 789-790 n.2 (1985). If the grand jury wishes to charge the defendant with two closely related offenses, it is free to do so. But when a court decides, at the end of the case, to instruct the jury on a crime not charged in the indictment, simply because that crime is closely related to the crime that was charged, the court is preempting the grand jury's role in determining the scope of the indictment. Under the elements test, the grand jury knows that the defendant will be tried only on the offense that it selects, together with any lesser included offenses specifically created by Congress. Under the inherent relationship test, the defendant may end up being subject to trial and conviction on a charge that the grand jury did not contemplate, or even one on which it expessly declined to indict.

2. Petitioner also contends (Pet. 20-22 (citations omitted)) that as a matter of law his actions could not have constituted mail fraud, "because the mailing of title documents by the victims of his odometer tampering scheme were counterproductive to his scheme, or at most routine mailings, intrinsically innocent." The court of appeals correctly concluded that a rational jury could find that the mailings were "for the purpose of executing" (18 U.S.C. 1341) petitioner's scheme.

Petitioner does not contend in this Court that he did not cause the mailings. See Pereira v. United States, 347 U.S. 1, 8-9 (1954) (defendant causes mailings when they are foreseeable result of his actions)). Relying on this Court's decision in United States v. Maze, 414 U.S. 395 (1974), however, petitioner maintains (Pet. 21) that his scheme did not depend on the mailings for its success, because he realized his illicit gain

before the dealers sent in the registration applications. Petitioner also asserts (Pet. 21-22) that the mailing of those applications increased the chance that he would be apprehended.

Petitioner is wrong in asserting that the mailings "did nothing to assist" him (Pet. 22). On the contrary, the mailings were "'for the purpose of executing the scheme, as the statute requires'" (Maze, 414 U.S. at 400, quoting Kahn v. United States, 323 U.S. 88, 94 (1944)). The automobile dealers whom petitioner defrauded used the mailings to obtain titles for their customers, which made the cars marketable. The dealers' ability to register the automobiles, in turn, made it possible for petitioner to defraud the dealers on an ongoing basis (see Pet. App. v (of 12 mailings alleged in the indictment, four made by one dealer and five by another)). 10/ As the court of appeals explained in the case on which it relied here, United States v. Galloway, 665 F.2d 161, 165 (7th Cir. 1981), cert. denied, 456 U.S. 1006 (1982), "[o]nly the experience of a successful title transfer, therefore, would induce the dealer * * * to purchase other automobiles from [petitioner]. Any failure in the title application process would have endangered [petitioner's] scheme by discouraging the retail dealer from making further purchases of his automobiles."

Thus, this case is significantly different from Maze, in which the defendant committed a series of isolated credit card frauds and had no interest in the mailings through which his victims billed the bank that issued the credit card. The mailings in Maze were not necessary to Maze's victims' continued participation in his scheme, because that scheme did not depend on the continuing confidence of particular victims in the legitimacy of their transactions with Maze.

Petitioner is wrong in relying on any increased risk of apprehension created by the mailings. 11/ The fact that some

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10/ The evidence at trial showed that petitioner's scheme was quite extensive, involving roughly 150 automobiles between 1978 and 1980. Tr. 102.

(Continued)

step in a fraudelent scheme could conceivably bring the operation to the authorities' attention does not keep it from contributing to the scheme's success. In Maze, the Court explained (414 U.S. 403) that the mailings did not contribute to the success of the scheme and observed that in fact they made the defendant's arrest more likely; the Court did not suggest, however, that because the mailings created that risk they could not possibly have furthered the scheme. 12/

CONCLUSION

The petition for a writ of certiorari should be granted, limited to Question 1. In all other respects the petition should be denied.

Respectfully submitted.

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11/ Petitioner implies (Pet. 22) that the mailings caused his fraud to be detected. That is not correct. Petitioner was apprehended because of complaints by purchasers (Tr. 123). Testimony at trial indicated that although it was theoretically possible for the information contained in the mailings to have led to petitioner's detection, that was not likely, because the applications submitted by the dealers would not, by themselves, show that the odometers had been altered (Tr. 111-112).

12/ Petitioner also argues (Pet. 19-20) that review by this Court is necessary in order to maintain respect for stare decisis. The suggestion that en banc reconsideration of a court of appeals' prior cases is somehow inappropriate, or is a basis for review in this Court, is obviously without merit. The en banc mechanism is designed to strike the appropriate balance between the need for stability in the law and the requirement that cases be decided correctly.